Supreme Court, U. S.
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SEP 2 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-326

ANDREW J. HINSHAW,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1976
No._____

ANDREW J. HINSHAW,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO: THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT

Petitioner ANDREW J. HINSHAW respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California affirming the judgment of The Honorable Frank Domenichini, judge of the Superior Court in the State of

California for the County of Orange, who refused to hear or decide motions made by Petitioner to dismiss the Amended grand jury indictment, charging that the Petitioner committed the following offenses under the Penal Code of the State of California, to wit, violation of Penal Code §72, fraudulent claim; Penal Code §424, embezzlement and falsification of accounts by public officers, misappropriation; Penal Code §424(1), misappropriation; Penal Code §484, theft; Penal Code §487, grand theft; Penal Code §488, petty theft; and Penal Code §504, fraudulent appropriation.

OPINION BELOW

The Supreme Court of the State of California denied a Petition for Hearing to review the order of the Superior Court of the State of California for the County of Orange which denied the motion to dismiss the amended grand jury indictment. A Petition for Writ of Prohibition/Mandamus to dismiss the indictment was made to the Fourth District of the Court of Appeal of the State of California, and was summarily denied.

JURISDICTION

The Petition for Hearing in the Supreme Court of California was denied on August 25,

1976, and is annexed hereto as Appendix "A."

The order of the Fourth District of the Court of Appeal of the State of California denying the Writ of Prohibition/Mandamus is annexed hereto as Appendix "B."

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

No application for an extension of time to file this petition has been sought.

QUESTIONS PRESENTED

Whether, considering the empowering statute of the State of California to create and hold Grand Jury sessions, Petitioner has been denied his constitutional rights of due process and equal protection by the inherent structure of the Grand Jury System and because he was deprived of a post-indictment preliminary hearing or examination.

Whether, Petitioner was deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the Federal Constitution or under Article 1, §7(a) of the California Constitution when the district attorney concealed and failed to inform the grand jury of the nature and existence of evidence which would reasonably tend to negate the guilt of the Petitioner.

Petitioner also directs the Court's attention to the case of Bruce David McAllister against the State of California, docket No. 75-6875, wherein similar questions were raised by Petitioner McAllister, who is presently awaiting an order from this Honorable Court, either granting or denying his writ of certiorari.

STATEMENT OF THE CASE

Petitioner is currently a Member of Congress for the 40th Congressional District in California. From 1965, until his election to Congress in 1972, Petitioner served as elected Assessor of Orange County. In 1974, while running for re-election for Congress the grand jury investigated activities for the Assessor's office during Petitioner's 1972 campaign. On December 11, 1974, nine members of the Assessor's office were indicted for working on Petitioner's 1972 campaign on County time. Further grand jury hearings were held and on May 6, 1975, an amended indictment was filed which added Petitioner as a defendant and which added counts by which Petitioner was charged with conspiracy and violations of Penal Code sections 72 (Fraudulent Claim), 424 (Embezzlement and Falsification of Accounts by Public Officers; Misappropriation), 424 (Grand Theft), 488 (Petty Theft), and 504 (Fraudulent Appropiation). On May 8, 1975, Petitioner was arraigned and on May 29, 1975, Petitioner entered a plea of not guilty.

The matter is presently set to be tried by jury on August 31, 1976.

At no time did Petitioner receive a post-indictment preliminary hearing. Admittedly, Petitioner did not request or demand such a hearing for the following reasons: (1) Requests made by the other defendants named in the same amended indictment with Petitioner were summarily denied by Superior Court; (2) To the best of Petitioner's information and belief no trial court in the State of California had ever afforded a post-indictment preliminary hearing; and, (3) It was incumbent upon the Superior Court, not Petitioner, to provide Petitioner with a post-indictment hearing or examination. Petitioner never waived his rights under either the federal or state Constitutions to a post-indictment preliminary hearing. At no time did the Superior Court or the Real Party in Interest advise Petitioner that he was entitled to a post-indictment preliminary hearing under the federal or state Constitutions.

On June 21, 1976, Petitioner filed a pretrial motion to dismiss the amended indictment on the ground that he had been denied his constitutional right to due process of law when the district attorney failed to inform the grand jury of exculpatory evidence, as required by Johnson v. Superior Court, 15 Cal. 3d 244 (1975). The exculpatory evidence of which the district attorney had knowledge was the consent by the County of Orange to the activities in the Assessor's office which led to the indictment

and then to the amended indictment.

The motion to dismiss was denied by the Superior Court on July 26, 1976, on the ground that People v. McAllister, 54 Cal.3d 918 (1976), prevented the court from hearing Petitioner's motion to dismiss on its merits. People v. McAllister, supra, held that Johnson v. Superior Court, supra, is not retroactive.

The Petition for Writ of Prohibition/ Mandamus was denied without opinion by the Fourth District of the Court of Appeal on July 27, 1976.

The Petition for Hearing in the Supreme Court of the State of California was denied on August 30, 1976.

REASON FOR GRANTING THE WRIT

This case presents the crucial questions of whether the Grand Jury System as utilized in the State of California is inherently violative of the constitutional guarantees of due process and equal protection of law. More specifically it raises the question of whether, under the circumstances and facts of this case, Petitioner was deprived of his constitutional rights to due process and equal protection of the law. Petitioner asserts that this case vividly illustrates and once again resounds the alarm beckoning the courts for judicial reform of a

system which flies in the face of the due process and equal protection clauses of the federal and state Constitutions, i.e., the Grand Jury System which historically served as a bulwark, standing solidly between the ordinary citizen and an overzealous prosecutor. Moreover, that the due process and equal protection clauses of the federal and state Constitutions require the judiciary to enforce restraints upon prosecutors who choose to utilize the Grand Jury indicting process, to insure that the independence of that body is assured; that prosecutors be compelled to disclose to the Grand Jury all evidence relevant and material to the charge(s) against an accused and that the failure of the district attorney to do so in this case deprived Petitioner of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, §7(a) of the California Constitution.

THE INSTITUTION KNOWN AS THE GRAND JURY IS NO LONGER EFFECTIVE IN PROTECTING INDIVIDUALS AGAINST ARBITRARY AND IMPROPERLY MOTIVATED PROSECUTIONS.

Historically, the grand jury has been looked upon as a suitable device for protecting the weak or unpopular from judicial harassment or politically motivated prosecutions. The grand jury system is a product of the common

law. (Fitts v. Superior Court, 6 Cal. 2d 230, 240 (1936).) The grand jury is supposed to function as a body of neighbors who aid the state in bringing criminals to justice while protecting the innocent from unjust accusation. (Wood v. Georgia, 370 U.S. 375, 390 (1962).) However, of the numerous studies undertaken in this country to assess the efficacy of the grand jury, all have concluded that it is no longer effective in protecting individuals against arbitrary prosecutions, and that it no longer exercises the independent judgment required by due process. The late Senator Wayne Morse conducted a landmark study which concluded:

> "Grand juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval, and often uncritically, the wishes of the prosecuting attorney. At best the grand jury tends to duplicate the work of the committing magistrate and prosecutor." Morse, A Survey of the Grand Jury System, 10 Ore L. Rev. 101 note 6, at 363.

The National Commission on Law Observance and Enforcement in its Report on Prosecution (page 124 (1931)), concluded similarly, stating:

> "The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the

> dictates of his own sense of propriety and justice. [It] has ceased to perform or to be needed for the function for which it was established."

The lofty esteem which has previously been accorded the grand jury by the courts has also recently degenerated. The 2nd Circuit recently described the grand jury as basically "a law enforcement agency." United States v. Cleary, 265 F. 2d 459, 461 (1959). The Supreme Court of Michigan although avoiding what was characterized as "serious questions of equal protection and due process" recently held that the present system "denied to the accused indicted by a multiple-man grand jury what has become recognized as a fundamental right in most criminal cases--the right to a preliminary examination." (People v. Duncan, (1972) 388 Mich. 489 [201 N.W. 2d 629, 635]). The California Supreme Court also recognized some of the short-comings of the grand jury to learn of and obtain exculpatory evidence, and consequently, the court held "that when a district attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under section 939.7 (California Penal Code) to inform the grand jury of its nature and existence..." (Johnson v. Superior Court, 15 Cal. 3d 248, 255 (1976).) This remedy was described by Justice Mosk in his concurring opinion as:

> "...a mere analgesic to ease the procedural pain instead of probing

> the need for substantive corrective surgery.... [T]he majority's palliative measure does not eliminate our obligation to deal with constitutional considerations. Rather, ...the present case is a vivid illustration of the intrinsic constitutional infirmity in the grand jury's indicting function as presently exercised in California. (Justice Wright and Tobriner, concurring, Johnson, supra, at 255-256.)

William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, recently recommended that the grand jury be completely eliminated and replaced by a procedure encompassing an advisory preliminary examination before a judicial officer to determine probable cause. See Campbell, "Eliminate the Grand Jury," Journal of Criminal Law and Criminology, Vol. 64, No. 2 page 174 (1973).

Finally, it should be noted that even this court after almost 200 years of unquestioned support has acknowledged that:

> "The Grand Jury may not always serve its historical role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." United States v. Dionisio, (1973) 93 S.Ct. 764, 773.

The impetus behind all of this criticism is the awareness that grand juries today are more dependent on the prosecutor for their successful operation than ever before. Indeed, grand juries normally hear only those cases presented by the prosecutor and only the prosecution's side of the case. He is the party responsible for securing the attendance of witnesses whom he selects, and also for the presentation of other evidence. He conducts the examination of the witnesses, instructs the grand jurors as to what laws are alleged to have been violated, and draws the indictment. As a public official and lawyer, the prosecutor also commands considerable respect from the lay persons constituting the grand jury. Thus, the danger arises that the prosecutor will be able to prejudice and even manipulate the grand jurors and thereby obtain indictments which, under "neutral" conditions, would not normally be issued. The conduct of the prosecutor may take several forms and may occur at different stages in the indictment process. It may, for example, occur through the use of abusive language used by the prosecutor in discussing the character of the accused. See, State v. Good, (1969) 10 Ariz. App. 556; 460 P.2d 662. Or perhaps the prosecutor will unduly compliment the credibility of his own witness. See, State v. Joao, (1971) 53 Hawaii 226, 491 P.2d 1089. The prosecution may also attempt to create preindictment publicity in the hope of inflaming public sentiment and thereby reaching prospective grand jurors. See, United States v. Osborne, 350 F.2d 497 (6th Cir. 1965) aff's. 385 U.S. 323 (1967). The danger

may be even more apparent in cases where the accused is a public official or public figure and the prosecutor is using the grand jury to further his own political ends. However, it may also arise where the prosecutor's performance is judged by the number of indictments or convictions he returns.

Consequently, Petitioner asserts that if we are to breed new life into the historical assumption of neutrality which underlies the grand jury process it will be encumbent upon this court to adopt a procedure which will balance the grand jury process with the need for due process and equal protection safeguards. The only feasible and reliable cure available is to allow every indicted defendant a post-indictment preliminary hearing as a matter of right.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS REQUIRE THAT ALL INDICTED DEFENDANTS RECEIVE A POST-INDICTMENT PRELIMINARY HEARING OR EXAMINATION.

At this point Petitioner would ask the court to take judicial notice of the argument set forth in the concurring opinion by Justice Mosk (concurred in by Justice Wright) and in separate concurring opinion of Justice Tobriner in Johnson v. Superior Court, 15 Cal. 3d 244, 255-270 (1975),

for said argument is the strongest possible one that Petitioner can make.

THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL AND CALIFORNIA CONSTITUTIONS REQUIRE THE JUDICIARY TO ENFORCE RESTRAINTS UPON PROSECUTORS WHO SEEK INDICTMENTS VIA GRAND JURY AND TO COMPEL DISCLOSURE TO THE GRAND JURY OF THE NATURE AND EXISTENCE OF EVIDENCE REASONABLY TENDING TO NEGATE GUILT.

In light of Coleman v. Alabama, (1969) 399 U.S. 1, and Morrissey v. Brewer, (1972) 408 U.S. 471 and their progeny, the traditional argument that the grand jury merely determines whether probable cause exists to bind an accused over for trial can no longer be considered as valid reasoning for the avoidance of due process and equal protection safeguards during the grand jury process. In Coleman, supra, this Court concluded that the preliminary hearing is a critical stage of the criminal process at which the accused is entitled to the guiding hand of counsel. Id. at 10.

Thus, as so amply stated by Justice Mosk in his concurring opinion in Johnson, supra, "The conclusion is inescapable that if a preindictment

proceeding (as was the case in Coleman) is a critical stage of the criminal justice process requiring due process safeguards, a fortiori the indictment proceeding itself is a critical stage." Id. at 263.

This Court in Morrissey v. Brewer, supra, recognized the due process rights of parolees at prerevocation hearings, mandating that two separate hearings be held prior to parole revocation. The first hearing is designed to determine whether probable cause exists to believe the parolee has violated a condition of parole; the second is the formal revocation hearing. Furthermore, the court stated that the minimum requirements of due process in revoking parolee include (a) written notice of claimed violation; (b) disclosure to parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a neutral and detached hearing body such as a traditional parole board and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

If due process requires these various procedural protections in preliminary and parole revocation hearings and since there is no basis for differentiating the rights which should be accorded an individual who is brought to trial via indictment rather than by information, then it follows that equal if not greater safeguards should be invoked in order to protect the liberty

of a prospective indictee.

The requirement that a district attorney who seeks an indictment be obligated to inform the grand jury of the nature and existence of evidence reasonably tending to negate guilt when compared to the procedural safeguards observed by this Court in Coleman, supra, and Morrissey, supra, seems quite modest. The prospective indictee has no right to appear either in person or by counsel before the grand jury. He has no right to produce witnesses or evidence on his own behalf. Nor is he given the opportunity to confront or cross-examine adverse witnesses. In short, any rights which a prospective indictee may have are placed upon the shoulders of his accuser, to wit, the district attorney:

> "...it can hardly be doubted now that prosecutors must observe some limits of essential fairness in their work with such investigating bodies." United States v. Sweig, 316 F.Supp. 1148, 1153 (1970).

Now is the time to impose proper restraints upon the prosecutor to guarantee true neutrality of our Grand Jury System. And of these restraints, the first and most essential is the minimal procedural safeguard of requiring that a prosecutor disclose all relevant and material exculpatory evidence to the Grand Jury. And, where the trial judge, on review of the Grand Jury proceedings, discovers

nondisclosure, the charges should be summarily dismissed.

CONCLUSION

Under these circumstances and for the reasons set forth above, Petitioner respectfully submits that this Court should grant this Petition for Certiorari in order that it can be decided once and for all whether the Grand Jury System is inherently violative of the Constitutional guarantees of due process and equal protection and whether under these circumstances, the Petitioner was deprived of his rights to due process and equal protection of the law.

DATED: August 31, 1976.

Respectfully submitted

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APPENDIX A

SUPREME COURT
FILED
JUL 30 1976
G.E.BISHEL, Clerk

No. 4th Civil No. 17203

IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA

ANDREW J. HINSHAW,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, CECIL HICKS, DISTRICT ATTORNEY FOR ORANGE COUNTY
Real Party in Interest

PETITION FOR HEARING
AND APPLICATION FOR STAY OF TRIAL SET FOR AUGUST 4, 1976

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE FRANK DOMENICHINI JUDGE

JOHN P. McNICHOLAS
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ANDREW J. HINSHAW

4th Civil No.
17203

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ANDREW J. HINSHAW,

Petitioner

vs.

THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE
ORANGE,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA
BY THEIR ATTORNEY, CECIL HICKS,
DISTRICT ATTORNEY FOR ORANGE COUNTY,

Real Party in Interest

PETITION FOR HEARING
AND APPLICATION FOR STAY OF TRIAL SET
FOR AUGUST 4, 1976

APPEAL FROM
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE FRANK DOMENICHINI JUDGE

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4th Civil No.
1 7 2 0 3

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ANDREW J. HINSHAW,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ORANGE,

Respondent.

PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, CECIL HICKS, DISTRICT ATTORNEY FOR ORANGE COUNTY

Real Party in Interest

PETITION FOR HEARING

TO DONALD R. WRIGHT, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, ANDREW J. HINSHAW, respectfully Petitions this Honorable Court for an order transferring the within cause to itself

for hearing and decision on the grounds that it is necessary for the settlement of important questions of law; and, upon such hearing and decision, for an order dismissing the amended indictment against ANDREW J. HINSHAW below.

The Court of Appeal for the Fourth Appellate District, Division Two (San Bernardino) denied a Petition for Writ of Prohibition/Mandamus and Application for Stay of All Proceedings on Tuesday July 27, 1976. A true copy of such order is attached hereto as an Appendix.

The two important questions of law presented by this Petition are:

1. Was petitioner deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution because he did not receive a post-indictment preliminary hearing or examination?

(a) Was petitioner required to make a request for a post-indictment preliminary hearing when the requests by other defendants had been denied?

(b) Is it incumbent upon the respondent court to sua sponte provide for a post-indictment preliminary hearing?

2. Was petitioner deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution when the district attorney concealed and failed to inform the grand jury of the nature and existence of evidence which would reasonably tend to negate the guilt of the petitioner?

Therefore petitioner now requests that this Court accept jurisdiction of this case for the purpose of declaring: (1) That the due process and equal protection clauses of the federal and state Constitutions require that all indicted defendants receive post-indictment preliminary examination; and, (2) That when the district attorney presents a case to the grand jury for indictment the equal protection and due process clauses of the state and federal Constitutions require the district attorney to inform the grand jury of the nature and existence of evidence tending to negate the guilt of the accused.

STATEMENT OF THE CASE

Petitioner is currently a Member of Congress for the 40th Congressional District in California. From 1965 until his election to Congress in 1972, petitioner served as elected Assessor of Orange County. In 1974, while running for re-election for Congress the grand jury investigated activities for the Assessor's office during petitioner's 1972 campaign. On December 11, 1974, nine members of the Assessor's office were indicted for working on petitioner's 1972 campaign on County time. Further grand jury hearings were held and on May 6, 1975, an amended indictment was filed which added petitioner as a defendant and which added counts by wich petitioner was charged with conspiracy and violations of sections 72, 424, 424(1), 484, 487, 488 and 504 of the Penal Code. Petitioner was arraigned and entered a plea of not guilty. The matter was set for trial which has now been "trailed" to Wednesday, August 4, 1976 in Department 20 of the Orange County Superior Court in order for petitioner to present this Petition to the Supreme Court.

At no time did petitioner receive a post-indictment preliminary hearing. Admittedly, petitioner did not request or demand such a hearing: (1) Requests made by the other defendants named in the same amended indictment with petitioner were summarily denied by the respondent court; (2) To the best of petitioner's information and belief no trial court in the State of California including respondent court, has ever

afforded a post-indictment preliminary hearing; and, (3) It is incumbent upon the respondent court, not petitioner, to provide petitioner with a post-indictment prelminary hearing or examination. Furthermore, petitioner has never waived his rights under either the federal or state Constitutions to a post-indictment prelminary hearing under the federal or state Constitutions.

Petitioner's motions to dismiss the amended indictment came on for hearing before the Honorable Frank Domenichini in Department 20 of the respondent court on July 26, 1976. Respondent court ruled that the holding in People v. McAllister (1976) 54 Cal. 3d 918, prevented respondent court from hearing or deciding petitioner's motion to dismiss the amended indictment on its merits; i.e., that petitioner was deprived of his Constitutional rights when the district attorney failed to inform the grand jury of the nature and existence of exculpatory evidence.

The exculpatory evidence of which the district attorney had knowledge was the consent by the County of Orange to the activities in the Assessor's office which led to the indictment and then to the amended indictment.

On July 27, 1976, petitioner filed a Petition for Writ of Prhohibition/Mandamus and Application for Stay of All Proceedings in the Fourth District of the Court of Appeal, Division Two (San Bernardino), wherein petitioner raised the identical issues that are presented by this

petition. The petition was denied without an opinion on the same day.

ISSUES RAISED BY THIS PETITION

The Supreme Court should stay the trial set August 4, 1976, in order to resolve these two important questions of law:

1. Was petitioner deprived of equal protection of the laws or of due process of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution because he did not receive a post-indictment preliminary hearing?

   (a) Was petitioner required to make a request for a post-indictment preliminary hearing when the requests of other defendants had been denied?

   (b) Is it incumbent upon the respondent court to sua sponte provide for a post-indictment preliminary hearing?

2. Was petitioner deprived of equal protection of laws or of due process

of law under either the Fourteenth Amendment of the federal Constitution or under Article 1, Section 7(a) of the California Constitution when the district attorney concealed and failed to inform the grand jury of the nature and existence of evidence which would reasonably tend to negate the guilt of the petitioner?

REASONS WHY THIS PETITION SHOULD BE GRANTED

1. The due process and equal protection clauses of the state and federal Constitutions require that all indicted defendant's receive a post-indictment preliminary hearing or examination.

The strongest possible argument that petitioner can make in support of this point is set forth in the concurring opinion by Justice Mosk (concurred in by Chief Justice Wright) and in the separate concurring opinion of Justice Tobriner in Johnson v. Superior Court (1975) 15 Cal. 3d 244, §55-270.

The case of People v. Duncan (1972) 388 Mich. 489 [201 N.W. 629, 635] cited by Justice Mosk in Johnson, supra, at page 257, was followed in People v. Barbara (1974) 390 Mich.

377 [214 N.W. 2d 833] wherein it was held that a felony defendant charged by grand jury indictments was entitled to a preliminary hearing and that a misdemeanor defendant charged by grand jury indictment was likewise entitled.

By granting the relief sought by this petition, those accused of felonies by grand jury indictment would have the same Constitutional rights as a suspect in a lineup (U.S. v. Wade (1967) 388 U.S. 218), as a parolee charged with parole violations (Morrissey v. Brewer (1972) 408 U.S. 471,) as a prison inmate at a disciplinary hearing (Wolff v. McDonnell (1974) 413 U.S. 539), and, as a parolee at a parole recission hearing (Gee v. Brown (1975) 14 Cal. 3d 571), thereby affecting a long overdue reform of the grand jury's indicting process.

Petitioner's failure to make a demand for a post-indictment preliminary hearing which had never been granted in the history of California jurisprudence, and which, when it was demanded by petitioner's co-defendants, was summarily refused, will not defeat petitioner's claim here that petitioner was constitutionally entitled to such a hearing before a magistrate. (See Screws v. United States (1945) 325 U.S. 91, and Suhay v. United States, 10 Cir, 1938, 95 F2d 890.) The courts indulge in every reasonable presumption against waiver of procedural due process rights. (Fuentes v. Shevin, Fla. (1972) 407 U.S. 1983.)

2. The due process and equal protection clauses of the state and federal Constitutions require that when a district attorney seeks an indictment he is obligated to inform the grand jury of the nature and existence of evidence reasonably tending to negate guilt.

Petitioner is entitled to a constitutionally conducted grand jury proceeding. The superior court has no jurisdiction to proceed with a felony trial unless a valid indictment has first been presented. (Cal. Const., Art. I, Section 8; Penal Code Section 682). By with holding the exculpatory evidence from the grand jury, the district attorney frustrated the grand jury proceeding from being Constitutionally conducted thereby depriving petitioner of equal protection and due process.

The prosecutor is under a duty not to conceal or suppress evidence negating guilt. Intentional suppression of material evidence denies a fair trial and under many circumstances he must disclose exculpatory evidence even without a request. (See in Re Ferguson (1971) 5 Cal. 3d 525.) By analogy if the prosecutor is Constitutionally required to disclose exculpatory evidence to his adversary at the time of trial, no less stringent requirement should be imposed where he is presenting evidence against a potential indictee before the grand jury. In each example the concealment of exculpatory evidence is repugnant to the concepts of fairness implicit in

the equal protection and due process clauses of the federal and state Constitutions.

Finally, if the prosecutor is expected to produce exculpatory evidence as well as incriminating evidence before the grand jury, which side does he emphasize? Which position does he advocate? It would appear that there is also a serious question involving the right of both sides to effective and competent counsel as required by the Sixth Amendment of the federal Constitution. Such an apparent irreconcilable conflict of interests might be resolved by allowing persons appearing before the grand jury to appear with their own attorneys and allow cross examination. An alternative is the post-indictment preliminary hearing or examination discussed above.

If due process is truly this flexible concept that we have been taught that it is and that it has to do with the denial of "fundamental fairness, shocking to the universal sense of justice", then concealment of exculpatory evidence from the grand jury certainly goes further then merely violating Penal Code Section 939.7 as held by the majority in Johnson v. Superior Court (1975) 15 Cal. 3d 248, and clearly violates the concept of due process.

Respectfully Submitted

MORGAN, WENZEL & McNICHOLAS
Professional Corporation

JOHN P. McNICHOLAS

APPLICATION FOR TEMPORARY STAY OF PROCEEDINGS

It is hereby requested that trial be stayed in the matter of People of the State of California Plaintiff, vs. Andrew J. Hinshaw, Defendant, Orange County Superior Court Case No. C 33269. The trial has been "trailed" until Wednesday, August 4, 1976, before Honorable Frank Domenchini, Department 20, Orange County Superior Court, at which time jury selection is scheduled to commence.

A stay of all proceedings including the trial in this case is necessary in order to permit this Court to rule on the two important questions of law presented by the within petition which is incorporated herein by reference.

This application is based upon the declaration of John P. McNicholas and upon the petition for hearing, all filed herein.

Dated: July 29, 1976

Respectfully Submitted

MORGAN, WENZEL & McNICHOLAS
Professional Corporation

John P. McNicholas
JOHN P. McNICHOLAS

DECLARATION IN SUPPORT OF APPLICATION FOR STAY OF TRIAL SET FOR AUGUST 4, 1976

I John P. McNicholas declare:

I am an attorney licensed to practice law in the State of California.

I represent the petitioner herein.

Petitioner's jury trial is currently scheduled to begin on Wednesday, August 4, 1976, at 10:00 a.m. in Department 20 of the Orange County Superior Court before the Honorable Frank Domenchini. Trial in this matter has been "trailed" from Wednesday, July 28, 1976 in hopes that this Court will rule upon the issues raised in the petition for hearing filed herewith. However, if this Court does not stay the trial as presently scheduled, the respondent court will proceed to trial in this matter and if this Court has not ruled on the issues raised in the within Petition for Hearing before the time set for trial, petitioner will be forced to proceed to trial in violation of his rights under the federal and state Constitutions all as more fully set forth in the within Petition for Hearing.

If trial is held as scheduled on August 4, 1976 prior to a ruling by this Court, it will also result in needless expenditure and inconvenience in the event that this Court later grants the relief prayed for in the within Petition for Hearing.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 1976, at Los Angeles, California.

John P. McNicholas
JOHN P. McNICHOLAS

PROOF OF SERVICE

I am a citizen of the United States and a resident of Los Angeles County. I am over the age of 18 years and not a party to the within action. My office address is 1545 Wilshire Boulevard, Suite 800, Los Angeles, California 90017.

On July 29, 1976, I served the within PETITION FOR HEARING AND APPLICATION FOR STAY OF TRIAL SET FOR AUGUST 4, 1976, on the below named parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereof fully pre-paid, in the United States mail at Los Angeles, California, addressed as follows:

Fourth Appellate District, Court of Appeal
640 State Bldg.,
303 W. 3rd Street
San Bernardino, California 92401

Evelle Younger, Attorney General
Bank of American Plaza
110 West A Street
Suite 600
San Diego, California 92101

Hon. Frank Dominichini
Judge of Superior Court
34 Civic Center Plaza
Santa Ana, California 92701

Cecil Hicks, District Attorney for Orange County
Courthouse
Post Office Box 808
Santa Ana, California 92702

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 29, 1976, at Los Angeles, California

Craig Winterman

Craig L. Winterman

APPENDIX B

RECEIVED
JUL 29 1976
MORGAN, WENZEL &
McNICHOLAS

COURT OF APPEAL-STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT

DIVISION TWO

ANDREW J. HINSHAW, 4 Civ.
NO 17203
Petitioner,
vs. COUNTY NO C-33269

SUPERIOR COURT, ORANGE COUNTY
Respondent,
and
PEOPLE,
Real Party in Interest

BY THE COURT:

The petition for writ of prohibition/ mandate is DENIED.

COPY

Kaufman, J.
Acting P.J.

Court of Appeal-Fourth Dist.
FILED
JUL 27 1976
Ervin J. Tuszynski, Clerk

Deputy Clerk

Copies to:_____

County Clerk, Orange County, Santa Ana
Morgan, Wenzel & McNicholas, Attys.,
1545 Wilshire Blvd., Ste 800,
Los Angeles 90017
Hon. Frank Dominichini, Judge of the
Superior Court, 34 Civic Center
Plaza, Santa Ana, CA 92701
Dist. Atty., Orange County, Santa Ana

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG 2 5 1976

I have this day filed Order

HEARING DENIED

ORDER FINAL FORTHWITH

In re: 4 Civ. *No.* 17203

Hinshaw

vs.

Superior Court, Orange

Respectfully,

G. E. BISHEL
Clerk

40748-877 9-75 3M OSP